(23)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 394.

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

May It Please the Court:

The Petition of Mae Huffman respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

For convenience, Petitioner and Respondent will be referred to as Plaintiff and Defendant. The cause is a

civil action, brought in the District Court of the United States for the Western District of Missouri, to recover damages, alleged at $35,000, for personal injuries received by plaintiff in a fall, on the basement stairs of a dwelling owned by defendant in Kansas City, Missouri, alleged to have been caused by the negligence of the defendant.

Plaintiff is a citizen of the Western District of Missouri, and defendant, Home Owners' Loan Corporation, is incorporated by an Act of Congress, with "authority to sue and be sued in any court of competent jurisdiction, Federal or State" (12 U. S. C., Sec. 1463 (a)). Defendant's stock is wholly owned by the United States (12 U. S. C., Sec. 1463 (b)). The District Court had jurisdiction on the ground that the suit arose under a law of the United States (28 U. S. C., Sec. 41 (1)), the Government of the United States being "the owner of more than one-half" of defendant's capital stock (28 U. S. C., Sec. 42).

The matter involved is a decision of the Circuit Court of Appeals for the Eighth Circuit, which, as plaintiff contends, decides questions of Missouri law in conflict with the controlling Missouri decisions, and violates the rule of *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 608, and Rule 52 (a) of the Federal Rules of Civil Procedure, by disregarding, and in effect setting aside, findings of fact of the District Court, based upon substantial and abundant evidence.

Upon a trial in the District Court without a jury, the Court found the facts specially, stated separately its conclusions of law thereon, and directed the entry of judgment for defendant and against the plaintiff. From the judgment so entered plaintiff appealed to the United States Circuit Court of Appeals for the Eighth Circuit

(R. 34). The Circuit Court of Appeals, in an opinion by Judge Woodrough, affirmed defendant's judgment and overruled a timely petition for rehearing filed by plaintiff. The case was originally tried by Judge Albert L. Reeves, sitting without a jury, and he rendered judgment for the plaintiff in the sum of $20,000 (*Huffman* v. *HOLC*, 39 Fed. Supp. 139). Upon appeal therefrom the United States Circuit Court of Appeals for the Eighth Circuit reversed and remanded the case for a new trial (*HOLC* v. *Huffman*, 124 F. 2d 684), the opinion being written by Judge Gardner. The plaintiff then procured an order from Judge Reeves dismissing the case without prejudice, and the defendant appealed therefrom and the Court of Appeals reversed Judge Reeves's order and remanded the case for further proceeding (*HOLC* v. *Huffman*, 134 F. 2d 314). The cause was then transferred by Judge Reeves, on his own motion, to Judge Otis, and came on for trial before him, sitting without a jury. His judgment was rendered that plaintiff take nothing and from such judgment an appeal was prosecuted.

Facts As to Building and Accident.

In 1937 the defendant became the owner of the building in question which was a two story and basement residence facing north on St. John Avenue in Kansas City, Missouri; there was a wooden stairway which ran down northward from the first floor to the basement floor along the west wall of the basement; there were nine steps or treads down to a landing about four feet square, and then there were two steps on the east side of the landing down to the concrete basement floor; the treads of the step were made of two inch material resting upon wooden stringers or horses and the treads had

an overhang of one and one-half inches; the fourth tread, counting from the top, was split longitudinally into two nearly equal parts. This longitudinal split in the fourth tread had existed for many years and immediately after the accident to plaintiff was found to be filled with lint, and paint at various places had run into the split. On the morning following the accident the fourth tread was removed, preserved just as it was, and was offered in evidence upon both trials and was made a part of the record and transmitted to the Circuit Court of Appeals upon both the appeals.

In the Spring of 1938 the building had become uninhabitable and unrentable and the defendant caused its property manager to make an inspection of the entire premises to determine what should be done with the property, and it was decided that the entire house should be reconditioned throughout; on June 13th or 14th, 1938, the head of the Reconditioning Department of defendant, Roy L. Butterworth, made a thorough and complete examination of the entire house, including the basement stairs, to determine what work should be done to put the premises in a rentable, habitable and saleable condition. Butterworth in making such inspection not only worked under general instructions but under a printed instruction under which "we were required to make additional repairs other than recommendations by the Property Management Department, and appraises, anything that would be hazardous, *and we paid particular attention to stairways*, porch steps, stair rails, what we called preservative items which might cause damage to the property" (R. 74) (emphasis ours).

Butterworth, as defendant's witness, testified that he made a thorough and complete examination of the stairway, "looked at the structural part, all parts of the

steps" (R. 75); measured the steps and took the size and length of treads (73); saw cracks and splits in the tread (R. 73), and when asked by the Court—"What was your purpose in examining the stairway?" he said, "It was to see whether it was in sound condition" (R. 73). The horse or stringer under the east or right-hand end of the fourth tread was split off at the corner and one of the nails at that end of the tread did not penetrate the horse at all but stuck outside and was painted over. All of the treads were 32 inches long and the fourth tread was 9 inches wide north and south and *the front half was 3-7/8 inches wide with an overhang of one and one-half inches,* and the front half of the split tread was held in place by only one eight penny rusty nail. The fourth tread was the height of Butterworth's head when he stood on the basement floor at the east side of the stairway. In making his inspection of the stairway, Butterworth testified that he stood on the basement floor with his face close to the east end of the fourth tread and that he saw the tread from that position (R. 72, 73). He further testified, when shown the fourth tread in court, that the front half of the tread less than four inches wide with an overhang of over an inch "would be a bit dangerous" (R. 75); that he examined the steps "for all purposes, anything that was there" (R. 77); that he had instructions to see that the stairway was safe and not hazardous (R. 76). In short, Butterworth admitted that he made a thorough and detailed examination of every structural part of the stairway and saw that some of the treads were split. It was shown without dispute that the eight penny nail used in this tread was an improper size and that nothing less than a sixteen penny nail should have been used.

With full knowledge of all of the aforesaid facts Butterworth made his report to the defendant and caused

specifications to be drawn up which called for only the replacement of a broken board in the landing at the bottom of the stairs.

On or about July 30, George H. Sweeney called upon a Mr. Hess of the Kelly-Townsdin Realty Company, the rental agent of defendant, and inquired about renting this house and was told that the rent would be $25 per month, and Hess told him that they were going to spend about $800 on repairs on the place, and Sweeney got the key and went to the house and found it was unlivable without thorough repairs, and he found that the basement stairway was in bad condition and shaky, and he went back to see Mr. Hess and told him about the stairway (R. 56). And Sweeney testified: "Mr. Hess informed me from time to time not to worry about it, the place would be put in safe condition and ready for me by the first of September" (R. 57).

Mr. Hess, called by the defendant, testified that he "told Mr. Sweeney that the repairs would be generally complete" (R. 71). On or about the 15th of August, 1938, Sweeney rented the premises, occupancy to begin on September 1st. On or about that date the defendant entered into a contract with one Hansen to do the work called for by the specifications and the work was done in practically the time called for and Sweeney moved in on or about the first of September (R. 70).

Promptly after the work started the defendant employed Robert S. King, a fee inspector who worked under the same instructions, written and oral, that Butterworth worked under, and he inspected the premises five times during the progress of the work. He testified that he examined all parts of the stairway and looked at every one of the stair treads and the horses (R. 64); stood on the basement floor alongside the stairway and saw that

that piece of the stringer supporting the fourth tread was chipped off (R. 61). King had a thorough and detailed knowledge of all of the structural parts of the stairway and this was acquired pursuant to his instructions from the defendant.

On or about the 14th of November, 1938, the plaintiff went to work for the Sweeneys as a beauty operator. They conducted a beauty parlor on the first floor and Mrs. Huffman lived there until January 27, 1939, when the accident, which is the basis of this suit, occurred. At the top of the basement wall on the west side of the stairway there was a ledge upon which the Sweeneys placed various bottles of oil and liquid shampoo to be used in the business. On the day in question Mrs. Huffman went down to the fourth tread and got a gallon bottle or jug of shampoo oil and brought it up into the kitchen and there filled a small bottle and then she went to put the bottle back on the ledge and got down to the fourth tread with her right foot, with the left foot on the third tread, and while turning west or to her left to put the bottle on the ledge the front half of the split fourth tread tilted and caused her to be precipitated headlong down the stairway causing the grievous and permanent injuries set forth in the complaint.

Plaintiff sustained a concussion of the brain and was semi-conscious and irrational for ten days. She had a comminuted fracture of the right shoulder, glass penetrated her right eyelid and punctured the right eyeball; she sustained many disfiguring scars, lost a great deal of blood and blood transfusions were given and she was permanently incapacitated.

Plaintiff's Theory of Liability.

Plaintiff's amended complaint alleged, among other things:

"(3) On or about July 16, 1938, one George H. Sweeney offered to rent said premises from the defendant for Twenty-five ($25) Dollars per month upon condition that defendant would, among other things, repair said steps and put them in a reasonably safe condition for use, occupancy to begin September 1, 1938. On or about August 15, 1938, defendant accepted said offer, agreed to make said repairs and thereafter proceeded to make repairs to said steps. Prior to said offer of said Sweeney to rent said premises, one of the treads of said steps was defective and dangerous in that it was insecure and the outer portion thereof likely to tip when a person stepped or put weight upon it by reason of not being securely nailed to the stringer underneath it. In the said performance of repairs upon said stairs defendant failed to repair said tread or remedy said defective and dangerous condition of said tread, or to make said tread reasonably secure, and said tread at all times herein mentioned remained defective and dangerous in the respects heretofore stated."

"(c) In that said defective and dangerous condition of said tread was concealed and not easily discoverable by said tenant Sweeney and his employees and invitees, including plaintiff, and unknown to them, but known to defendant at the time defendant agreed to rent said premises to Sweeney and at the time defendant put Sweeney in possession of said premises, and defendant wrongfully and negligently failed to inform said Sweeney or this plaintiff of said dangerous and defective condition and wrongfully and negligently assured said Sweeney when it delivered possession of said premises to him that said premises and said steps had been repaired and were reasonably safe for use under said tenancy."

Upon the first trial before Judge Reeves the case was submitted solely upon the first aforesaid allegation, to-wit: "the negligent repair theory," and Judge Reeves rendered judgment in favor of the plaintiff for $20,000 (39 Fed. Supp. 139), and upon appeal from the judgment rendered by Judge Reeves in favor of the plaintiff the Circuit Court of Appeals reversed and remanded the case solely upon the ground that since it was not shown that the defendant did any actual work upon the fourth tread that it could not be held liable for negligently repairing said tread, the Court saying:

> "We think that negligence must in the instant case be confined to any acts of attempted repair of the fourth tread," and
>
> "We think it clear that under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who actually makes a repair and as a result of his negligence in so doing injury results" (*Home Owners Loan Corp. v. Huffman*, 124 F. 2d l. c. 687-688).

(That this holding is absolutely contrary to the law and controlling decisions of the state of Missouri, we shall later point out and demonstrate.)

Upon the trial before Judge Otis, the case was submitted not only upon the "negligent repair theory" but also upon the "concealed defect theory," that is, that when defendant rented the premises to Sweeney and put him in possession of them the defendant "wrongfully and negligently failed to inform said Sweeney or this plaintiff of said dangerous and defective condition" even though the defendant knew thereof or had knowledge of facts that put it upon inquiry as to the danger.

Notwithstanding the fact that plaintiff supplied Judge Otis, at the inception of the trial, with an exhaustive

brief covering the "concealed defect theory," Judge Otis, at the conclusion of the evidence made his findings of fact and conclusions of law and never even mentioned the "concealed defect theory" in his opinion (R. 21 to 27). Thereupon the plaintiff filed her motion for a new trial (R. 29-30), and then for the first time Judge Otis in a memorandum (R. 32) said, in substance, that plaintiff could not recover under the "concealed defect theory," "For one thing, defendant owed no duty to plaintiff or its tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread." We shall point out later that the reason given by Judge Otis is wholly untenable and his decision is contrary to the law and controlling decisions of the state of Missouri.

Sometime after the decision by the Circuit Court of Appeals, upon the first appeal, the Supreme Court of the state of Missouri handed down its opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, decided November 1, 1943, in which it specifically overruled the cases of *Davis* v. *Cities Service Co.*, (Mo. App.) 131 S. W. 2d 865, and *Logsdon* v. *Central Development Association, Inc.*, (Mo. App.) 123 S. W. 2d 631, which in substance were the bases for the opinion by Judge Gardner (see 124 F. 2d l. c. 687, and held that:

> "That it is our view that the requirement of the Restatement of the Law of Torts that the repairs must 'make the land more dangerous for use' and its appended comment to that effect should not be adopted or followed. It necessarily follows that insofar as the *Lodgson* and *Davis* cases adopted that law they should be overruled."

And further said:

> "The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right." 174 S. W. 2d l. c. 848, 849, and
>
> "A lessor of land, who conceals or fails to disclose to lessee any natural or artificial condition involving unreasonable risk of bodily harm to persons upon the land, is subject to liability * * *, if (a) the lessee does not know of the condition or the risk involved therein, and (b) the lessor knows of the condition and realizes the risk involved therein and has reason to believe that the lessee will not discover the condition or realize the risk."

After the rendition of the *Bartlett* opinion by the Supreme Court of Missouri the plaintiff procured an order from Judge Reeves dismissing this case without prejudice and without terms. And at that time Judge Reeves wrote a memorandum opinion on defendant's motion for costs, and in the memorandum opinion Judge Reeves said:

> "The opinion of the Court of Appeals should be considered on these motions. The Court of Appeals in its decision relied largely upon the case of *Davis* v. *Cities Service Oil Co.*, (Mo. App.) 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Appeals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, l. c. 849. The Supreme Court announced the identical principle applied at the trial of this case.
>
> "The Court quoted approvingly in Bartlett's case: 'His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.'"

And Judge Reeves further said:

> "An inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, supra.*"
>
> "The tenant (lessee) testified without equivocation that the defendant had contracted with him to put the entire premises in a safe and habitable condition and that in reliance upon that agreement he became a tenant of the property. While it was true that the defendant, through its agent, showed the tenant some particular repairs that it intended to make, this was not conclusive and was not intended to be conclusive upon the tenant as to what repairs were in fact to be made. It was the agreement that the defendant would inspect the premises and make all the repairs necessary to make the premises safe. It was the evidence that a reasonable inspection would have disclosed the obvious weakness of the fourth tread of the stairway from the bottom (top). It was not patent to an unskilled person but should have been obvious to a qualified inspector."

(The memorandum opinion of Judge Reeves is made a part of the record by Judge Otis (R. 23).)

Judge Otis made thirteen findings of fact, the last three of which are as follows:

"11. Plaintiff's injuries were not caused nor contributed to by any negligence or want of ordinary care on her part.

"12. Plaintiff was caused to fall by the sudden tipping of the fourth tread of the basement stairway as she was standing on that (and on the third) tread. The tread was caused to tip because it was (and long had been) longitudinally split into two parts; because plain-

tiff's weight was placed on the outer edge of the outer half (approximately) of the tread; because the tread had —by reason of the split and of the fact that the end of it nearest which was plaintiff's foot was held to the underlying horse by a single—and somewhat loosened—nail—a freedom of movement up and down about the fulcrum made by the connection of nail and horse. By reason of these matters the fourth tread was not safe.

"13. Any reasonable inspection of the stairway by a skillful artisan would have disclosed the longitudinal split in the fourth tread and would have put him on inquiry concerning its safety. Any reasonably careful investigation would have disclosed that the fourth tread was not reasonably safe."

Judge Gardner upon the first appeal said:

> "The crack was as apparent to Sweeney as it was to the inspector." 124 F. 2d l. c. 688.

The crack or longitudinal split was obvious to anybody. It was obvious to Butterworth and King. The "danger" was not obvious to the plaintiff else she would have been held guilty of contributory negligence as a matter of law. Since the longitudinal split in the fourth tread put Butterworth, a skilled artisan, upon 'inquiry" concerning its safety, then, under the law and controlling decisions of the state of Missouri the defendant "had reason to suspect concealed defects or dangers" and if it did not exercise reasonable diligence to satisfy itself of their non-existence before leasing, without mentioning the matter to its tenant, it will be liable (1 Tiffany on L. & T. 567). "So that the proper statement of the rule is that the landlord will not be liable for concealed defects or dangerous conditions existing at the time of the demise unless he knew of the defects OR HAD KNOWLEDGE

OF FACTS FROM WHICH HE OUGHT TO HAVE KNOWN, OR WILL BE PRESUMED TO HAVE KNOWN OF THEM" (*Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11) (Emphasis ours).

The law of Missouri as to the liability of a landlord who has knowledge of concealed defects or knowledge of some fact which puts him on inquiry concerning the existence of concealed dangers will be discussed later in our Argument.

Findings and Evidence in District Court As to Liability.

The District Court, Judge Otis, found that the fourth tread was not safe because it was split in two parts and the front half of the fourth tread was held to the underlying horse only by a single loosened nail which permitted freedom of movement up and down and that any reasonable inspection of the stairway by a skilled artisan would have disclosed the longitudinal split in the fourth tread and would have put him on inquiry concerning his safety, and any reasonable careful investigation would have disclosed that the fourth tread was not reasonably safe (R. 72). The split in the tread was obvious as found by the Court of Appeals upon the first appeal, the Court saying:

"The crack was as apparent to Sweeney as it was to the inspector."

As the split was obvious, and as Butterworth made a thorough examination of the stairway treads, then he too saw the split, and Judge Otis found that having seen the split, Butterworth was put on inquiry concerning the safety of the tread. And the Court of Appeals having found that the split was obvious, and Judge Otis having found that the split would put Butterworth on inquiry concerning its safety, then it must follow that un-

der the law of Missouri the defendant had reason to suspect the existence of concealed dangers and was *then* required to exercise reasonable diligence to satisfy itself of the non-existence of danger before leasing without mentioning the matter to its tenant, and the District Court erred in not rendering judgment for the plaintiff upon the concealed defect theory.

The District Court further found that even though the defendant admitted, by the testimony of Butterworth, that it made a full inspection of the entire stairway for the purpose of discovering defective and dangerous conditions therein, and conditions needing repairs, for the purpose of making said steps reasonably safe for use, yet since the defendant only provided in the specifications for the replacement of a board in the landing and did no work on other parts of the stairway that plaintiff could not recover.

Judge Otis found, in substance, that the defendant did not "undertake" to repair the stairway even though it made a full inspection for the purpose of determining the safety of the stairway but did undertake to repair or replace the board in the landing, because it actually did some work on the landing. In other words, Judge Otis found and held that the defendant could not legally "undertake" the repair of the stairway unless it actually did some work on the fourth tread. He also held that the landing was not a part of the stairway because it was a separate unit, saying: "But the landing is one unit, the basement stairway is a different unit * * *."

We contend that the whole wooden structure from the first floor to the basement floor constituted the basement stairway and that the landing is just as much a part of the stairway as each step or tread was. The defendant having admitted that it agreed to make the

whole premises, including the stairway, safe, and having made a full inspection and examination of the stairway for the purpose of making it safe, the fine spun theory of Judge Otis that the landing is a separate unit and no part of the stairway is untenable and contrary to the undisputed evidence.

While Judge Otis did not make any mention of the concealed defect theory in his original opinion, he did file a memorandum and order on plaintiff's motion for new trial (R. 32) in which he discussed the "concealed defect theory" as follows:

> "2. It was said by counsel that if in the trial the evidence was essentially the same as in the earlier trial, nevertheless a new issue was emphasized at this trial, the issue of hidden, latent, defect, known to the landlord and concealed from the tenant. Our findings, 11, 12 and 13, are pointed to as relevant to that issue and as proving plaintiff's theory in connection with that issue. We think the conclusion is a *non-sequitur*. For one thing, defendant owed no duty to plaintiff or its tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread."

While the above quotation is not a finding of fact it does reflect the trial court's view as to the law. Judge Otis in substance held that even though he had found that the split was obvious and that Butterworth in inspecting the stairway saw the split and that seeing the split put him on inquiry concerning its safety, the plaintiff was not entitled to recover upon the concealed defect theory because the defendant owed to plaintiff no duty to make an inspection of the stairway on which plaintiff was injured. This holding is in direct conflict

with the law and controlling decisions of Missouri, as has been heretofore pointed out and which will be more fully presented in our Argument.

Rulings of the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the judgment of the trial court and held that since "the defective fourth tread of the stairway which caused plaintiff's injuries had remained untouched by the landlord from the time of renting of the premises until the time of the injury" the plaintiff could not recover. This holding is in direct conflict with the law and controlling decisions of the Supreme Court of Missouri in *Bartlett* v. *Taylor,* 174 S. W. 2d 844, and with *Vollrath* v. *Stevens,* 202 S. W. 283-286; *Lasky* v. *Rudman,* 337 Mo. 555, 85 S. W. 2d 501, and *Shaw* v. *Butterworth,* 327 Mo. 622, 38 S. W. 2d 57.

And with reference to the "concealed defect theory" the Circuit Court of Appeals refused to follow and apply Findings of Fact 12 and 13 made by the Trial Court (R. 26, 27) that Butterworth having seen the obvious longitudinal split in the fourth tread was put on inquiry concerning its safety and any reasonably careful investigation would have revealed that the fourth tread was not reasonably safe, and refused to follow and apply the last and controlling decisions of Missouri, *Meade* v. *Montrose,* 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell,* 124 Mo. App. 317, 101 S. W. 606; *Griffin* v. *Freeman,* 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin,* 183 Mo. 164, 81 S. W. 1094; *Mahnken* v. *Gillespie,* 329 Mo. 51, 42 S. W. 2d 797, and *Streckenfinger* v. *Bullock,* 60 S. W. 2d 661.

The Circuit Court of Appeals erroneously held that the case of *Bartlett* v. *Taylor,* 174 S. W. 2d 844, handed down by the Supreme Court of Missouri after the de-

cision of the Circuit Court of Appeals herein on the first appeal, did not overrule the basis of Judge Gardner's opinion upon the first appeal to the effect that the defendant is not liable unless it actually worked upon the fourth tread and negligently made it worse. The holding, that since the defective fourth tread remained untouched by the defendant it cannot be liable, is contrary to the *Bartlett* case, and the other cases cited, and is particularly contrary to the case of *Vollrath* v. *Stevens*, 202 S. W. 283, where the Court said:

> "* * * However, when defendant took upon herself the burden to use ordinary care to repair the premises so that they would last for a reasonable length of time, and in discharging this duty to repair, if she failed to remove rotten boards, floors, supports and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not non-feasance."

B.

STATEMENT OF JURISDICTION OF THIS COURT.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (28 U. S. Code, Sec. 347 (a)), and under the same Act, Ch. 229, Sec. 8, 24 Stat. 940 (28 U. S. Code, Sec. 350).

The case properly originated in the United States District Court under Sec. 24 (1) of the Judicial Code as amended by the Act of March 3, 1911, Ch. 231, Sec. 24, 36 Stat. 1091 (28 U. S. Code, Sec. 41 (1)) and the Act of February 13, 1925, Ch. 229, Sec. 12, 43 Stat. 941 (28 U. S.

Code, Sec. 42), as a proceeding brought against a corporation incorporated under an Act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock, with authority to sue and be sued in any court of competent jurisdiction, Federal or State, Act of June 13, 1933, Ch. 64, Sec. 4, 48 Stat. 129; April 27, 1934, Ch. 168, Secs. 1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, Ch. 847, Secs. 506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, Ch. 150, Secs. 10-16, 17 (a), 49 Stat. 296-297, (12 U. S. Code, Sec. 1463 (a) and (b).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered on June 27, 1945. Plaintiff, as appellee, filed a petition for rehearing on July 12, 1945, which the Circuit Court of Appeals denied on July ....., 1945. The Circuit Court of Appeals has stayed its mandate until September 3, 1945, and pending the filing of a petition for *certiorari*, evidenced by a certificate therefor by the Clerk of this Court, and certificate of the Clerk of the Circuit Court of Appeals filed with the petition here. This petition for *certiorari* and supporting transcript of the record are filed prior to September 3, 1945, with the request that the Clerk of this Court send to the Clerk of the Circuit Court of Appeals certificate of the filing thereof.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court.

The case is an action for damages for personal injuries caused by the negligent failure of the defendant

landlord to repair the fourth tread of the basement stairway of the rented premises, when defendant had undertaken to repair the stairway, and the negligent failure of the defendant to warn the plaintiff or the tenant George H. Sweeney of the dangerous and defective condition of the fourth tread when the defendant knew of said dangers and was put upon inquiry as to said defective conditions when the defendant rented the premises to said Sweeney and put him in possession thereof.

The Circuit Court of Appeals for the Eighth Circuit affirmed the judgment for defendant rendered upon a trial in the United States District Court without a jury. The Circuit Court of Appeals ruled that under the Missouri law plaintiff could recover from the defendant in tort only on account of negligence of defendant in *acts of actually attempted repair to the fourth tread of the stairway* thereby ruling in conflict with applicable Missouri decisions to the effect that a landlord who assumes to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them (*Bartlett* v. *Taylor*, 174 S. W. 2d 844; *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503; *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. 2d 57, 62; *Vollrath* v. *Stevens*, 202 S. W. 283, 286).

The Circuit Court of Appeals also ruled that the defendant assumed to repair only the bottom landing of the stairway, contrary to the undisputed evidence that defendant assumed to repair and put in good condition the entire stairway (R. 55, 56, 57, 71, 72, 73, 74, 75, 76, 77).

The Circuit Court of Appeals refused to follow and apply the Trial Court's Findings of Fact 12 and 13 and

refused to follow and apply the last and controlling decisions of Missouri that if the defendant sees an obvious defect such as the longitudinal split in the fourth tread it was put on inquiry as to its safety and that there then arose a duty upon the defendant to pursue the inquiry and exercise reasonable diligence to satisfy itself of the non-existence of any danger before leasing without mentioning the matter to the tenant Sweeney or the Plaintiff, and refused to apply the law of Missouri that the defendant having knowledge of the existence of the longitudinal split and having knowledge of facts from which it ought to have known or will be presumed to have known of the dangers the defendant is liable.

(4) Cases believed to sustain the jurisdiction of this Court. The decision of question of defendant's negligence in conflict with controlling Missouri decisions.

Bartlett v. *Taylor*, 174 S. W. 2d 844.

Vollrath v. *Stevens*, 202 S. W. 283.

Lasky v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503.

Shaw v. *Butterworth*, 327 Mo. 622, 38 S. W. 2d 57, 70.

Kennedy v. *Bressmer*, 154 S. W. 2d 401.

Armbruster v. *Leavitt Realty & Inv. Co.*, 107 S. W. 2d 74.

Vitale v. *Duerbeck Estate*, 62 S. W. 2d 559.

Finer v. *Nichols*, 157 S. W. 1023.

Masonic Home of Mo. v. *Windsor*, 92 S. W. 2d 713.

As to concealed defects:

Meade v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11.

Meyers v. *Russell*, 124 Mo. App. 317, 101 S. W. 606.

Griffin v. *Freeman*, 181 Mo. App. 203, 168 S. W. 219.

Whitley v. *McLaughlin*, 183 Mo. 164, 81 S. W. 1094.

Mahnken v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d 797.

Helzberg v. *Ocean Accident & Guar. Co.*, 132 Fed. Sec. 438.

C.

THE QUESTIONS PRESENTED.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair to the fourth tread* of the stairway, has the Circuit Court of Appeals decided an important question of local law in a way in conflict with the applicable local decisions, *Bartlett* v. *Taylor*, 174 S. W. 2d 822; *Kennedy* v. *Bressmer*, 154 S. W. 2d l. c. 403; *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 501; *Vollrath* v. *Stevens*, 199 Mo. App. 5, 202 S. W. 283, 285; *Shaw* v. *Butterworth*, 327 Mo. 622, 628, 38 S. W. 2d 57, 60; *Bloecker* v. *Duerbeck's Est.*, 333 Mo. 359, 62 S. W. 2d 553?

(2) In ruling that under the Missouri law plaintiff could not recover under the "concealed defect theory" even though the defendant prior to the letting of the premises to Sweeney knew of the longitudinal split in the fourth tread and failed to inform Sweeney or the plaintiff of the dangerous and defective condition has the Circuit Court of Appeals decided an important question of the local law in a way in conflict with the applicable local decisions, *Meade* v. *Montrose*, 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell*, 124 Mo. App.

317, 101 S. W. 606; *Griffin* v. *Freeman*, 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin*, 183 Mo. 164, 81 S. W. 1094, 66 L. R. A. 484; *Mahnken* v. *Gillespie*, 329 Mo. 51, 42 S. W. 2d 797; *Streckenfinger* v. *Bullock*, 60 S. W. 2d 661?

(3) In ruling the question of defendant's negligence both as to negligent repair and concealed defect, points 1 and 2 above, contrary to the Missouri decisions, has the Circuit Court of Appeals decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court? Since Federal jurisdiction of plaintiff's case is based upon the fact that the defendant is a Federal Corporation, has the Circuit Court of Appeals decided an important question of Federal law which has not been, but should be settled by this Court?

(4) In holding that the plaintiff was not entitled to recover even though the longitudinal split in the fourth tread was obvious and was seen and observed by Butterworth, defendant's reconditioning expert, contrary to the findings 12 and 13 of the District Court, and the evidence, has the Circuit Court of Appeals violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure, that "findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness"? And has the Circuit Court of Appeals thereby decided an important question of Federal law which has not been, but should be, settled by this Court, or has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, or render a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

(5) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the undisputed evidence, that defendant in fact, negligently failed to exercise ordinary care to repair the fourth tread although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition and although prior to the letting it had knowledge of facts which put it upon inquiry as to the dangerous and defective condition of the fourth tread, has the Circuit Court of Appeals violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness"? And has the Circuit Court of Appeals thereby decided an important question of Federal law which has not been, but should be, settled by this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair to the fourth tread* of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable local decisions,

Bartlett v. *Taylor*, 174 S. W. 2d 844;

Vollrath v. *Stevens*, 202 S. W. 283;
Lasky v. *Rudman*, 337 Mo. 555, 560, 85 S. W. 2d 501, 503;
Shaw v. *Butterworth*, 327 Mo. 622, 38 S. W. 2d 57, 60;
Kennedy v. *Bressmer*, 154 S. W. 2d 401;
Armbruster v. *Leavitt Realty & Inv. Co.*, 107 S. W. 2d 74;
Vitale v. *Duerbeck Estate*, 62 S. W. 2d 559;
Finer v. *Nichols*, 157 S. W. 1023;
Masonic Home of Mo. v. *Windsor*, 92 S. W. 2d 713,

to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless* of whether the landlord had *actual knowledge* of the defects or actually *attempted to remedy them.*

(2) In ruling the aforesaid question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins*, and other applicable decisions of this Court.

(3) In ruling that under the Missouri law governing the "concealed defect theory" plaintiff could not recover even though prior to the letting it had knowledge of the longitudinal split in the fourth tread and was thereby put upon inquiry as to its safety and had knowledge of facts from which it ought to have known or will be presumed to have known of the dangerous condition

of the fourth tread, the Circuit Court of Appeals has decided a Federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court, and the Circuit Court of Appeals has decided an important question of local law in conflict with the applicable local decisions, *Meade* v. *Montrose,* 173 Mo. App. 722, 160 S. W. 11; *Meyers* v. *Russell,* 124 Mo. App. 317, 101 S. W. 606; *Griffin* v. *Freeman,* 181 Mo. App. 203, 168 S. W. 219; *Whitley* v. *McLaughlin,* 183 Mo. 164, 81 S. W. 1094; *Mahnken* v. *Gillespie,* 329 Mo. 51, 42 S. W. 2d 797; to the effect that a landlord who had knowledge of concealed defects or dangerous conditions existing at the time of the demise or who had knowledge of facts which he ought to have known, or will be presumed to have known, of them, is liable to his tenant, and those in privy under him, unless he warns or informs the tenant and such persons of the dangerous and defective conditions. Under the law of Missouri, it is not necessary that a landlord must *know the danger concealed in this tread.* He is liable if he is aware of any condition which "puts him on inquiry concerning its safety," and he fails to exercise reasonable diligence to satisfy himself of the non-existence of the danger about which he is "put on inquiry," and fails to warn his prospective tenant thereof.

The Circuit Court of Appeals held that "plaintiff had not proved that defendant knew, at the time of the letting, of the defect that caused the accident," and affirmed the judgment of the trial court upon that ground, but it failed or refused to take into consideration the undisputed evidence that Butterworth knew of the longi-

tudinal split in the fourth tread and refused to apply and follow Findings of Fact 12 and 13 that such knowledge put the defendant on inquiry as to the safety of the tread, and failed or refused to follow the law of Missouri that knowledge of facts which put a landlord upon inquiry as to the safety of the tread is equivalent to knowledge of the defect itself, all contrary to the decisions aforesaid.

CONCLUSION.

Petitioner respectfully avers that the affirmance of defendant's judgment is based upon the decision of the Circuit Court of Appeals of important questions of Missouri law contrary to the applicable Missouri decisions, fortified by rulings of the Court in disregard of findings of fact 12 and 13 of the District Court which were amply supported by the evidence, in violation of Rule 52 (a), of the Rules of Federal Procedure.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 13023, Civil, *Mae Huffman, Appellant,* v. *Home Owners' Loan Corporation, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United

States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of *certiorari;* and your petitioner prays that she may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law; and your petitioner will ever pray.

Mae Huffman,
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